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No. 163 OCTOBER TERM, 1902.

Supreme Court of the United States

THE ATLANTIC AND PACIFIC TELEGRAPH COMPANY

Plaintiff in Error

against

THE CITY OF PHILADELPHIA

Defendant in Error

Brief of Defendant in Error

JAMES ALCORN
Assistant City Solicitor
JOHN L. KINSEY
City Solicitor
for Defendant in Error

Supreme Court of the United States

October Term, 1902. No. 163.

THE ATLANTIC AND PACIFIC TELEGRAPH COMPANY,

Plaintiff in Error,

AGAINST

THE CITY OF PHILADELPHIA,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

The contention between the parties to this appeal resolves itself into a single question, namely, whether the City of Philadelphia, a municipal corporation, can by ordinance impose on the Atlantic and Pacific Telegraphic Company a charge of $1.00 per pole per annum, and $2.50 per mile for wires per annum for the poles and overhead wires which the said telegraph company own and use, and have constructed on the public streets and highways of the said city.

The decision rendered by this Court on January 5, 1903, in Western Union Telegraph Company *vs.* Borough of New Hope, determines this question in favor of the defendant in error, and it would be probably sufficient to refer to the opinion filed in that case. The license fees charged by the Borough of New Hope were the same as those im-

posed by the defendant in error upon the plaintiff in error, and as this Court considered the charges as made by the Borough of New Hope reasonable, it would necessarily follow that the same charges imposed by the City of Philadelphia, defendant in error, were also reasonable.

The plaintiff in error admits that such a charge can be made only in the exercise of the police powers of the municipality, and that it was properly done in the exercise of those powers, but that the amount imposed is excessive and unreasonable. Admitting the right of the defendant in error to impose a license fee or charge for poles and wires as a police regulation, it is then only a question as to whether the amount of the charge imposed, namely, $1.00 for each pole and $2.50 for each mile of wire per annum is excessive and unreasonable. It is hardly necessary to discuss any questions of interstate commerce, or whether corporations engaged in interstate commerce can be subjected to State or municipal taxes.

It has been settled and quite recently in the case of City of Philadelphia *vs.* Western Union Telegraph Company, 89 Federal Reporter, 454, that

> "It is lawful for a State to impose taxes upon property owned and used within it by a corporation of another State, even when such corporation is engaged in interstate commerce, and that the exaction of a license tax is a valid exercise of power by municipal corporations, in order to cover expenses to which they may be put in the enforcement of their police rules and regulations."

This quotation is from Mr. Justice SHIRAS, who delivered the opinion of the Circuit Court of Appeals in the case above referred to, and therein makes the following citations: Telegraph Co. *vs.* Attorney General, 124 U. S., 530; License Tax Cases, 5 Wall., 462; Wiggins Ferry Co. *vs.*

City of E. St. Louis, 107 U. S., 365; Postal Telegraph Cable Co. *vs.* City of Charleston, 153 U. S., 692.

In the case of City of Philadelphia *vs.* Western Union Telegraph Co., *supra*, the said city was endeavoring to collect from the Western Union Telegraph Company similar license fees as are claimed from the plaintiff in error in this case. The same view was taken by the Circuit Court of Appeals in City of Philadelphia *vs.* Atlantic and Pacific Telegraph Company, 102 Federal Reporter, 258.

It may be proper in answer to the argument of the plaintiff in error to briefly consider the right of the municipality to tax telegraph companies, or to require them to pay rental for the use of the highways, but as it is not in the judgment of the defendant in error believed to be an important issue in this proceeding, and as the plaintiff in error admits that the charges imposed and for which the claim is made by the defendant in error can be sustained as a police regulation, we will endeavor to show that the charges are reasonable and the ordinances authorizing them are therefore valid.

As was said by Mr. Justice SHIRAS in the case of City of Philadelphia *vs.* Western Union Telegraph Company, 89 Federal Reporter, 460:

> "It has sometimes been urged that such questions are peculiarly suited for legislative determination. And it must be admitted that there is a presumption in favor of the validity of the action of the legislative body, and that the evidence to justify a court in holding otherwise must be clear and convincing. * * * Not only is there a presumption in favor of the validity of the action of the legislative body, but the facts upon which that action proceeds are so numerous, and so liable to frequent changes, courts should act cautiously in dealing with such a case, and admit evidence of all facts and circumstances that seem to bear, even somewhat remotely, upon the issue."

And citing with approval the opinion of the Supreme Court of Pennsylvania in Allentown *vs.* Telegraph Co., 148 Pa. St. Reports, page 119:

> "The amount of the license charges rests with the city councils in the first instance, and it is only where such discretion has been manifestly abused that the Courts are justified in interfering."

In referring to the language of Mr. Justice SHIRAS, above cited, the United States Court of Appeals in City of Philadelphia *vs.* Atlantic and Pacific Telegraph Co., 102 Federal Reporter, 258, says:

> "Having regard to the entire evidence, it cannot, we think, be affirmed that in the passage of the ordinance in question there was manifest abuse of legislative discretion by the city councils. The evidence here did not warrant such a finding by the jury. These views, of course, require us to say, not only that the Court should have affirmed the plaintiff's sixth point, but also the plaintiff's first and fourth points."

With practically the same evidence before them as was submitted by the plaintiff in error upon the trial of this case in the Circuit Court of the United States for the Eastern District of Pennsylvania, the United States Court of Appeals in the two cases above cited determined that the ordinances imposing the charges now claimed by the City of Philadelphia, defendant in error, against the Atlantic and Pacific Telegraph Company, plaintiff in error were valid. It would appear that these decisions of the United States Court of Appeals are sufficient authority for affirming the judgment of the Circuit Court in this case. Upon the trial of this case in the Circuit Court, the evidence submitted by both the defendant in error and plaintiff in error was iden-

tical with that submitted on the first trial, and which proceeding was reviewed by the United States Court of Appeals in 102 Federal Reporter, 258. The United States Circuit Court of Appeals sustained the first, third and fourth assignments of error filed by the City of Philadelphia.

There being then no sufficient testimony offered by the plaintiff in error upon the second trial, the learned Judge of the Circuit Court following the opinion of the United States Court of Appeals, directed a verdict for the defendant in error for the full amount of the charges. The same view has been taken by the Supreme Court of the State of Pennsylvania in several cases in which the charges imposed were similar to those claimed in this case. The plaintiff in error in its paper book refers to those cases, and they need be mentioned here only to impress upon the Court that the highest court of the State of Pennsylvania has considered these ordinances, and whether the charges imposed are reasonable or not, and have determined those charges to be reasonable, and the ordinances valid. These decisions are found in Taylor *vs.* Postal Telegraph Co., 202 Pa. St., 583; Chester *vs.* Western Union Telegraph Co., 154 Pa. St., 466; Allentown *vs.* Western Union Telegraph Co., 148 Pa. St., 117; Philadelphia *vs.* American Union Telegraph Co., 167 Pa. St., 406; Chester *vs.* Philadelphia, Reading and Pottsville Telegraph Co., 148 Pa. St., 120. The Superior Court of the State of Pennsylvania also found that charges similar to those in this case were reasonable and proper.

We have then a finding by the United States Circuit Court of Appeals and by the appellate courts of the State of Pennsylvania that the charges herein claimed were reasonable.

The Supreme Court of the State of New York in Philadelphia *vs.* Postal Telegraph Co., 67 Hun., 21, considered the same ordinances as imposed the charges in this case, and held them to be valid, and the charges reasonable.

The evidence in the court below shows clearly the reasonableness of the charges which the defendant in error is now attempting to collect from the plaintiff in error. They were imposed by the City of Philadelphia, defendant in error, by ordinances of January 6, 1881, see Record, page 26, and March 30, 1883, see Record, page 28. The first entitled "An ordinance to regulate the erection and maintenance of telegraph poles in the corporate limits of the City of Philadelphia." It contains a preamble as follows:

> "WHEREAS, great inconvenience and annoyance have been occasioned to property owners by the placing of telegraph poles in front of their premises:
>
> "AND, WHEREAS, the lives and property of citizens traveling upon the public streets and highways have been imperiled by the erection and maintenance of inadequate or unsound telegraph poles thereon, so that it has become necessary to establish a system for the proper inspection of such poles, and for the regulation of the erection and maintenance thereof."

It will thus appear that the purpose of the ordinance is to provide against inadequate or unsound telegraph poles and to establish a system for proper inspection so that the lives and property of citizens may not be endangered. In section two it provides for a thorough and careful inspection to be made at least once in every year, and makes it the duty of the Superintendent of the Police and Fire Alarm Telegraph to perform this work. This was clearly within the police powers of the city, defendant in error, and the charges imposed for that purpose were proper ones. That ordinance makes a charge for issuing a license for a pole of $1.00 for each and every pole per annum.

The ordinance of 1883 regulated the introduction and use of underground conduits, wires and cables for electrical conductors in the streets of the City of Philadelphia and to

provide for charges for underground, overground, or overhead wires, etc. It fixed a charge of $2.50 per mile for overhead wires for telegraphic and telephonic purposes.

It was shown that the defendant in error through its Electrical Bureau, to which were attached in 1891 a chief, a manager and assistant manager, a clerk and assistant clerk, a draftsman, six inspectors, a foreman and seven line men, made constant inspection of the poles and wires of the various telegraph and telephone companies, and that the police force of the said defendant in error were required as a part of its duty to take notice of the condition of the various poles and wires of telegraph and telephone companies. The evidence showed that the wages of these employees in the year 1891 amounted to $24,630.00. Besides this expense there was the cost of the offices occupied by the Electrical Bureau, maintenance of horses and wagons, and the expense of stables for those horses. It is true that these employees also performed work directly for the City of Philadelphia as to its poles and fire alarm telegraph, and its underground conduits and poles and wires. It was also shown that in case of fire these poles and overhead wires were a hindrance to the firemen in reaching the buildings on fire, and that there was necessarily entailed upon the city, defendant in error, an additional expense upon that account. Testimony was submitted as to the danger of overhead wires and the possibility of accidents both on account of the poles and wires. It would be difficult at any time to accurately determine how much of the expenditures in this connection related to the poles and wires of the plaintiff in error, or to the poles and wires of any telegraph or telephone company. It is not necessary to accurately fix the amount of expense to which the municipality is put because of the inspection of the poles and wires of the plaintiff in error. It is sufficient that the defendant in error shows expenses and losses approximately reaching the amount of license charges imposed.

The legislative body of the City of Philadelphia, defendant in error, having fixed the charges, it is presumed that they are reasonable, and the evidence of the defendant in error which would require a Court to declare such charges unreasonable or the legislative action invalid, must be clear and convincing. The burden is upon the plaintiff in error to show the unreasonableness of the charges. The evidence offered by the plaintiff in error in this case falls very short of proving anything in relation to the unreasonableness of the charges imposed. Whether the charges be reasonable or not cannot be determined by the amount of cost the plaintiff in error may be put to in repairing the poles and wires, nor would it be dependent upon the amount of business which the company, plaintiff in error, may do. The defendant in error, the municipal corporation, is the party to be reimbursed by the charges imposed, and when, as in this case, the express and evident purpose of the charges is to provide a system of inspection primarily to protect the property and rights of the citizens, it is the duty of the Court to sustain the legislative action. Whether the charges are reasonable or not is probably an issue of fact to be determined by a jury, and it was so determined in this case. It is the duty of the Court in trying an issue of fact before a jury, if there be not sufficient evidence to create any dispute of fact, to direct a verdict. In this case the ordinances were offered in evidence, thereby establishing a presumption of the reasonableness of the charges. The defendant in error could have rested upon the legislative action as set forth in these ordinances, but as the plaintiff in error put in some evidence for the ostensible purpose of showing the charges to be unreasonable, the defendant in error in rebuttal showed the establishment of an Electrical Bureau, the employment by the city, defendant in error, of various officials, linemen and inspectors, the constant inspection of the poles and wires, the duty of the police officers, the interference with the fire-

men, and the danger to the lives and property of the citizens by the poles and overhead wires. The plaintiff in error did not offer a scintilla of evidence which tended to rebut the presumption of the validity of the ordinances and the reasonableness of the charges. There was no issue of fact in dispute for the jury to determine. The learned Judge of the Circuit Court seeing that the defendant in error had established the validity of the ordinances and the reasonableness of the charges, and the plaintiff in error had not created a doubt as to the reasonableness of the charges, directed a verdict for the full amount of the claim of the defendant in error. Under all of the decisions nothing less could have been done.

It is not material whether the charges made be a license fee exacted under the power to regulate or the power to tax, as was said in Postal Telegraph Co. *vs.* Charleston, 153 U. S., 692, by Mr. Justice SHIRAS:

> "Whether a license fee is exacted under the power to regulate or the power to tax, is a matter of indifference, if the power to do either exists."

Nor is it material whether the charges made be considered as a rental for the use of the highways. Much stress is laid by the plaintiff in error in its paper book upon the difference between the powers of the City of Philadelphia, defendant in error, and those of the City of St. Louis as appears in St. Louis *vs.* Western Union Telegraph Co., 148 U. S., 92.

The defendant in error does not admit the position of the plaintiff in error that a tax could not be levied upon a telegraph company because it is engaged in interstate business, and contents itself with referring to Postal Telegraph Co. *vs.* Charleston, 153 U. S., 692; Western Union Telegraph Co. *vs.* Mass., 125 U. S., 530, and Wiggins Ferry Co. *vs.* East St. Louis, 107 U. S., 365.

So far as concerns the right of the plaintiff in error to occupy the public streets and highways of the defendant in error, without being subject to the regulations of the municipal authorities, the defendant in error disputes that position. It is true that the Constitution of the State of Pennsylvania gives the right to any association or corporation organized for the purpose to construct and maintain lines of telegraph within the State. The authority given by the Act of Incorporation of April 29, 1874, Section 33, P. L. 92, referring as it does to companies incorporated under that Act, provides that "the same shall not be so constructed as to incommode the public use of said roads, streets or highways, or injuriously interrupt the navigation of said waters." This Act was amended by the Act of May 1, 1876, P. L. 90, and section four of the last-mentioned Act is as follows:

> "That before the exercise of any of the powers given under this act, application shall be first made to the municipal authorities of the city, town or borough in which it is proposed to exercise said powers, for permission to erect poles or run wires on the same, or over or under any of the streets, lanes or alleys of said city, town or borough, which permission shall be given by ordinance only, and may impose such conditions and regulations as the municipal authorities may deem necessary: PROVIDED, That cities of the first class shall be exempted from the provisions of this act."

The Act of 1876 was further amended by the Act of June 25, 1885, P. L. 164, and this latter amendment reenacted the above recited section, except the proviso. It will therefore appear that in pursuance of the constitutional provision, the legislature has enacted a general law which requires the consent of municipal authorities before a telegraph company can erect poles or wires upon the public streets, and authorizes the municipal authorities to impose

such conditions and regulations as they may deem necessary. Were the plaintiff in error now endeavoring to erect poles and wires in the City of Philadelphia it could not do so without the consent of the municipal authorities, and those authorities could impose upon it such conditions and regulations as they deemed necessary.

The question of the right of the municipal authorities to regulate telegraph companies was before the local courts of the County of Philadelphia in 1876. On April 3d, of that year, the Court of Common Pleas, No. 4, of the County of Philadelphia rendered a decision in City of Philadelphia *vs.* Western Union Telegraph Co., 2 W. N. C., 455. A bill in equity was filed in that case to restrain the Western Union Telegraph Company from erecting in Philadelphia telegraph poles and fixtures without authority from Councils so to do, and that they be ordered to take down those so erected in violation of law. This application for an injunction was based upon the ordinance of City of Philadelphia of April 18, 1863, which made it unlawful for any telegraph company to erect any pole or poles in any of the streets, lanes or alleys of the City of Philadelphia, or to change the route of any telegraph line now erected, unless authorized by Councils. An injunction was issued as prayed for. It was therein clearly held that all legislative grants of power to private corporations to carry on business in the City of Philadelphia are made upon the implied condition that they shall be subject to such reasonable regulations as the city shall think necessary to enact in pursuance of its chartered powers for the protection of its citizens; and in case of any conflict arising between the city and such private corporations these regulations are to be construed liberally, and in favor of the city, and in furtherance of the rights of the public. It was held that the ordinance of 1863 was a lawful and reasonable police regulation necessary for the protection of public interests, and was binding upon the

telegraph companies empowered by legislation to run their lines through the city. In referring to the Act of Congress of 1866, Judge THAYER said:

> "But the defendants prefer still another claim which is asserted to be paramount alike to the city laws and the laws of Pennsylvania, and to override them all. They claim that under the Act of Congress of July 24, 1866, they are entitled to build lines of telegraph over any of the post roads of the United States. They assert that all the streets of this city are post roads of the United States, and so they are (Revised Statutes of the United States, page 773), and that they have therefore the right to use any or all of them for their lines. The act referred to (Revised Statutes of United States, page 1024) enacts that 'any telegraph company now organized, or which may hereafter be organized, under the laws of any State, shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States, which have been or may hereafter be declared such by law, and over, under or across the navigable streams or waters of the United States.'" * * * "The Act is operative doubtless over the public domain of the United States, and over such military or post roads as belong to the United States, or are under their exclusive control. But an attempt to extend it over the roads which are the property of the several States, and as to which the right of the soil is in general in private persons, upon the ground that these also are post roads of the United States, would, in my judgment, be an unconstitutional exercise of power. Such roads are not the property of the United States, and they have no rights in them other than a right of transit over them for postal pur-

poses. Such roads may at any time be vacated by the several States, or wholly diverted and changed in their course. While they exist and are declared post roads by Acts of Congress, the United States have the right to transport the mail along them, but this is the limit and extent of their authority over them. Congress could as readily pass a law giving to any railroad company organized under the laws of any State the right to construct a railroad over all the roads of the several States which are post roads, as they could give the defendants the powers which they claim under this Act—a proposition which I apprehend few would be bold enough to maintain."

This view of the Act of 1866 was endorsed by this Court in St. Louis *vs.* Western Union Telegraph Co., 148 U. S., 92. It was therein said:

"It is a misconception, however, to suppose that the franchise or privilege granted by the Act of 1866 carries with it the unrestricted right to appropriate the public property of a State. It is like any other franchise, to be exercised in subordination to public as to private rights. * * * It would not be claimed, for instance, that under a franchise from Congress to construct and operate an interstate railroad the grantee thereof could enter upon the State House grounds of the State, and construct its depot there, without paying the value of the property thus appropriated. Although the State House grounds be property devoted to public uses, it is property devoted to the public uses of the State, and property whose ownership and control are in the State, and it is not within the competency of the National Government to dispossess the State of such control and use, or appropriate the same to its own benefit or the benefit of any of its corpora-

> tions or grantees without suitable compensation to the State. This rule extends to streets and highways; they are the public property of the State. While for purposes of travel and common use they are open to the citizens of every State alike, and no State can, by its legislation, deprive the citizens of another State of such common use, yet when an appropriation of any part of this public property to an exclusive use is sought, whether by a citizen or corporation of the same or another State, or corporation of the National Government, it is within the competency of the State, representing the sovereignty of that local public, to exact for its benefit compensation for this exclusive appropriation."

It being admitted that the defendant in error, as a police regulation, had authority to impose a license fee upon the poles and wires of the plaintiff in error, and as it is conceded that the charges claimed in this case were levied in the exercise of the police powers of the municipality, and there being no evidence that the fees so exacted were unreasonable, but on the contrary, ample evidence that the charges made were reasonable, and as the reasonableness of the ordinance imposing the charges had been determined by the courts of common pleas of several counties of the State of Pennsylvania, and by the Superior and Supreme Courts of that State, and under evidence similar to that offered in this case by the United States Court of Appeals, and recently by this Court in the case of Western Union Telegraph Co. *vs.* Borough of New Hope, it is submitted that the judgment of the Circuit Court of Appeals should be affirmed.

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